The Constitution and the Flag. Memorial Day Address, May 30, 1907, delivered at Tonkawa, Okla. By Henry E. Ash.

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BY
HENRY E. ASP.

The Constitution and The Flag

Mr. Chairman, Ladies and Gentlemen:—

It is always with a feeling of embarrassment that I approach an occasion of this kind. All the questions to be discussed have been so thoroughly considered by the great men who lived and participated in the struggle of the civil war, that I feel my inability to add anything new to what has been said. Yet I greet you all with the assurance that my heart is warm to this great day, set apart to renew our inspirations with the memories of the past.

In this good hour, living in the gladsome sunshine of peace—surrounded by loving friends—mingling with patriotic hearts secure in the loving kindness of a beneficient providence—revelling in the abundance nature has provided for her children, with our flag waving over a nation—united—free—strong to protect her citizens, great or small, in every clime—we come today to lay a flower with reverence and love upon the grave of each departed hero.

And mingling our tears with the memories of other days, it is well that we should recall the cause in the defense of which they freely gave their lives a willing sacrifice upon the altar of their country.

At such a time it is perhaps well to concede that those who wore the gray and rallied around the stars and bars were honest in the conviction that their cause was just. That the sacrifice of life and property by the chivalry of the south was an honest offering of blood and treasure to a spirit of defense of home and fireside.

Yet, in the light of eternal history—with the declaration of independence and the constitution of the United States held firmly in our hands as a lamp to guide us through the darkness of those hours of struggle and privation, I must insist that there shall be written and ever remain on the pages of the history of our country, in letters of golden light, the everlasting truth that in this conflict the north was right and the south was wrong.

That the immortal Lincoln, pleading with the arrogant leaders of the south to respect the constitution and the flag, and to remain as a part of the union, fashioned and builded by the revolutionary fathers and sanctified to us by their blood, was a messenger chosen of God to do His will, in holding together this nation in its power and strength, free from the poison of human slavery, to become a brilliant example to the nations of the earth, that a government of the people, and by the people, and for the people, can exist on the face of the earth without its subjects bending the knee to a king, czar, or an emperor, and carrying to all nations the message of the Son of Man "Peace on earth, good will to men."

The year before the Mayflower landed at Plymouth Rock the Dutch slave ship landed at Jamestown. The rugged Pilgrims and their descendents extended westward, over the northern portion of the country, and builded homes for themselves in the northland, developing the resources of the country, and with pluck and energy and inventive genius fostered by climatic conditions, encouraging industry and personal endeavor. Such a development was not in harmony with the spirit of slavery.

The cargo of the Dutch slave ship expanded westward from Jamestown through the sunny south, creating and fostering a southern chivalry with slavery as its foundation. The climate and productions of the south and the inclinations of the people were favorable to the institution of slavery, and it became woven into the webb and woof of their home life.

These conditions grew with the colonies and when the oppression of the mother country forced the declaration of

independence and the federal constitution was framed, slavery was one of the stumbling blocks that came near defeating the work of the convention. By virtue of necessity as a matter of compromise, it was left unsettled to grow into the national life, an institution hostile to the genius of our institutions.

Ultimately it arrayed father against son and brother against brother—on the one side to preserve—on the other to destroy the Union.

Yet at the time of the adoption of the constitution representation in the congress of the United States was given to the slave states based upon their slave population which they held as property. And thus in the earlier years of the life of the constitution the south had in the congress more than its fair share of representation.

It may not be amiss to consider the conditions which led to the adoption of the federal constitution and its purposes as understood and expressed at the time and since its adoption.

The Continental Congress, a mere committee representing the several colonies—*a* limping, halting, impotent thing—was charged with the duty of providing for the common defense against the Indians, and to carry on the revolution.

With the war in progress it adopted and promulgated the declaration of independence, declaring in letters of living light "that all men are created equal; endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness."

These words will ring down through the ages as the guiding spirit of this republic.

The colonies, realizing the necessity for some kind of a united government with power to control the individual governments, and in order to further the common good of all, to incur liabilities that would be binding on all and to cement these colonies that had thus broken away from the control of the mother country into some form of a centralized government—in November, 1777, adopted the "Articles of Confederation and Perpetual Union."

Article 1 of which provides:

"The style of this confederacy shall be 'The United States of America.'"

And thus the title of states was given to the colonies.

Article 111, provides:

"The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."

Article V provides:

"For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November in every year, with the power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year."

"No state shall be represented in congress by less than two nor by more than seven members. * * *

"Each state shall maintain its own delegates in any meeting of the states, and while they act as members of the committee of the states."

"In determining questions in the United States, in congress assembled, each state shall have one vote."

In the concluding article the delegates framing these Articles of Confederation and Perpetual Union before signing declared as follows:

"And Whereas it hath pleased the great governor of the world to incline the hearts of the legislatures we respectively represent in congress to approve of, and to authorize us to ratify the said Articles of Confederation and Perpetual Union. Know ye, that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective consti-

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tuents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained."

Under these Articles of Confederation and Perpetual Union the revolutionary war was prosecuted, but as a framework of government it was unsatisfactory.

One of the great statesmen, who was a member of the constitutional convention, in discussing the government under the Articles of Confederation, said: "Before my departure for the convention, I believed, that the confederation was not so eminently defective, as it had been supposed. But after I had entered into a free communication with those who were best informed of the condition and interests of each state; after I had compared the intelligence derived from them with the properties which ought to characterize the government of our union, I became persuaded, that the confedertaion was destitute of every energy, which a constitution of the United States ought to posess.

"For the objects proposed by its institution were, that it should be a shield against foreign hostility, and a firm resort against domestic commotion; that it should cherish trade, and promote the prosperity of the states under its care.

"But these are not among the attributes of our present union. Severe experience under the pressure of a war—a ruinous weakness manifested since the return of peace; and the contemplation of those dangers, which darken the future prospect, have condemned the hope of granduer and of safety under the auspices of the confederation."

It was declared by other statesmen to be a rope of sand.

Mr. Bryce, in his American Commonwealth, describes the experience of the country under it as follows:

"This confederation, which was not ratified by all of the states until 1781, was rather a league than a national government, for it possessed no central authority except an assembly in which every state, the largest and the smallest alike, had one vote, and this authority had no jurisdiction over the individual citizens. There was no Federal executive, no Federal

judiciary, no means of raising money except by the contributions of the states, contributions which they were slow to render, no power of compelling the obedience either of states or individuals to the commands of Congress. The plan corresponded to the wishes of the colonists, who did not yet deem themselves a nation, and who in their struggle against the power of the British Crown were resolved to set over themselves no other power, not even one of their own choosing. But it worked badly even while the struggle lasted, and after the immediate danger from England had been removed by the peace of 1783, it worked still worse, and was in fact, as Washington said, no better than anarchy. The states were indifferent to the congress and their common concerns, so indifferent that it was found difficult to procure a quorum of states for weeks or even months after the day fixed for meeting. Congress was impotent, and commanded respect as little as obedience. Much distress prevailed in the trading states, and the crude attempts which some legislatures made to remedy the depression by emitting inconvertable paper, by constituting other articles than the precious metals legal tender, and by impeding the recovery of debts, aggravated the evil, and in several instances led to seditious outbreaks. The fortunes of the country seemed at a lower ebb than even during the war with England."

Washington, in 1786, said: "It is clear to me as A, B, C, that an extension of federal powers would make us one of the most happy, wealthy, respectable and powerful nations that ever inhabited the terrestrial globe. Without that we shall soon be everything which is the direct reverse. I predict the worst consequences from a half-starved, limping government, always moving upon crutches and tottering at every step."

This being the condition under the Articles of Confederation and Perpetual Union a convention of delegates from five states met at Annapolis, in Maryland, in 1786, to devise some method of strengthening the power of congress, to protect the commercial interests of the several states. This convention drew up a report condemning the existing state of

things and declaring that reforms were necessary and suggested a general convention in the following year to consider the condition of the union and the needed amendments in its constitution. Congress approved the report and recommended the states to send delegates to a convention which should revise the Articles of Confederation and report to congress and the several legislatures such alterations and provisions therein as shall when agreed to in congress and confirmed by the states render the federal constitution adequate to the exigencies of government and the preservation of the union. As recommended by the congress, delegates were chosen to the constitutional convention. The measure of its authority was to revise the Articles of Confederation and report to congress and the several legislatures such alterations and provisions therein as shall when agreed to in congress and confirmed by the states render the federal constitution adequate for the exigencies of government and the preservation of the union. The convention met at Philadelphia in May, 1787, and while it was called for the purpose of amending the Articles of Confederation and Perpetual Union, upon a consideration of that document and the needs and requirements of the government it was found impossible.

The one thing that was needed to protect the individual citizens of the several colonies, to regulate trade and commerce between the states and with foreign nations, to obtain a standing as one of the nations of the earth, was *a more perfect union.*

The purpose of establishing a more perfect union and to establish a nation in fact as well as in name is well understood when we consider the difficulties under which the country labored before the adoption of the Federal constitution.

One of the great lawyers of the country in discussing this question in an address before the American Bar Association has said:

"It is curious to note how little was said by those who pressed upon the people and upon the state governments the necessity for a convention, about the paramount reason that was in their minds, which was that the country was rapidly

drifting into anarchy. The governors and dignitaries who were working together to bring about a convention, the legislatures that passed resolutions in favor of it, and the great leaders who in private life were so influential in moulding public opinion, generally veiled the real meaning of the movement by talking about the necessity of a better understanding in respect to their commercial relations, a fair distribution of trade, the construction of canals and other such matters, which, though certainly important, were as nothing when compared with the immediate and imperative necessity of transforming the confederation into a government of real national vigor, possessing not only the authority which belongs to a nation but the power to vindicate it at home and abroad."

And the convention framing the constitution declared its purpose to be "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The first of the purposes named is to secure *a more perfect union.*

The constitution with this purpose was finally ratified by the several states and the great constitution, the like of which has never been framed, went into effect, and the government of the United States became a fixed fact and took its place among the nations of the world.

Gladstone has said of it: "The American constitution is the most wonderful work ever struck off at a given time by the brain and purposes of man."

Another English statesman has said: "It ranks above every other written constitution for the instrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language. Its judicious mixture of definiteness in principle with elasticity in details."

Under this constitution the country grew, new states were added to the union north and south. The chivalry of the south resting upon the institution of slavery. The strength of the

north in the brawn and muscle, industry and ingenuity of its yeomanry, the time came when the one great question left unsettled by the great convention threatened and attempted to overturn the purposes of the constitution.

From time to time the slave holding states had demanded that the free states should aid them in holding the possession of their slaves. Some of them complied and in violation of the declaration of independence fugitive slave laws were passed for the return to their southern masters of black men fleeing from bondage.

The great Marshall, whose great decisions had breathed into the constitution the breath of life, and aided to make it the bulwark of a great nation, had passed away and another great jurist with different ideas who had lived in a different atmosphere had taken his place. The question of slavery had been discussed in the congress and considered from time to time.

A black man who had been held as a slave in Missouri was taken by his master to Rock Island, Illinois, Illinois being a free state, and from thence to Fort Snelling, Minnesota, then a territory of the United States. He was afterwards taken back to Missouri and there sued for his freedom. The case was appealed from the courts of Missouri to the United States supreme court. The court held that no negro, whether free or slave, was a citizen of the United States and there was no constitutional process by which he could become so. That under the laws of the United States a negro could neither sue nor be sued and as a consequence the court had no jurisdiction in the case. That a slave was simply a piece of property or personal chattel to be taken from state to state like a horse or cow without the rights of the owner being affected, and that the act of congress providing that slavery should not extend above thirty-six degrees thirty minutes north latitude was unconstitutional and void. This decision was promulgated in 1857 and aroused the sentiment of the country, and in 1860 the great Lincoln, as a representative of the sentiment of the

country against the extension of slavery, was elected president of the United States.

The southern leaders refused to accept the will of the majority and when congress met in December following the election, they proclaimed the intention of their states to withdraw from the union, and during the same month South Carolina passed an ordinance seceding from the Union. Other states followed.

During all the time after his election until his inauguration, Lincoln gave every assurance that he could to the people of the south that so far as slavery in the slave states was concerned it was not his purpose or the purpose of his administration to interfere with it, and in his first inaugural address, after pleading with his countrymen to take no steps rashly towards dissolving the union, he said: "I am loth to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

An historian has thus described the facts leading up to the civil war: "Between the conclusion of our conflict with Mexico and the outbreak of the civil war, a period of more than twelve years, elapsed, and then came the great ordeal for the determination of the perpetuity of the union. The issue involved had existed since the foundation of the government. The peculiar organization of a union composed of thirteen parts, destined in the course of a century to become more than three times as many, left the way open for the bitter controversy relative to our constitution. Were we many, or were we one? In a sense we were one; in another sense we were many. According to our national motto we were Many in One. There was both unity and multiplicity; but which principal should predominate over the other? Should sovereignty rest in the union or rest in the states? It could not rest in both.

It must rest in one or the other. For a long time the question ebbed and flowed. Sometimes the discussion was wild; sometimes it was angry. At last the issue come to blows, and the blows to blood. The nation was rent asunder.

"Then armies rose from out the earth,
And great ships loomed upon the sea,
And liberty had second birth
In blood and fire and victory!"

And again, speaking of the great characters developed by this conflict, the historian says:

"Not on one side only did great men of the epoch rise. They of the confederacy as well as they of the union, exemplified every phase of heroism and sacrifice. Many died. Many came forth alive. Lincoln, the greatest of all, died in the hour of triumph

"He had been born a destined work to do,
And lived to do it; four long-suffering years—
Ill-fate, ill-feeling, ill-report lived through—
And then he heard the hisses change to cheers."

This historian further says: "Great were the consequences of the civil war; society in the United States was transformed. There was an unification of the people and a centralization of institutions. * * * * * There is a sense, however, in which the civil war was the beginning of nationality in our country. The right of states to secede from the union was destroyed by the unanswerable logic of the sword. The doctrine of Hamilton and Webster was victorious in McLean's house at Appomattox. The doctrine of Haynes and Calhoun was sheathed with the swords of Lee and Longstreet."

I have thus reviewed the history of the country and the causes that led to the civil war in order that we may not forget—and lest we forget—and to press home one central thought, that the constitution and the flag are one and inseparable forever.

It is not my purpose to review the struggles of the civil war or to discuss the merits or demerits of any of the great military leaders of those days. The union became an accom-

plished fact and north and south and east and west the flag is recognized as the flag of one country.

And here, today, in the name of these patriots whose graves we strew with flowers—I want to proclaim to the world that all men are created equal—and shall ever remain so under the constitution and the flag.

I have no words of apology for the deeds of these patriots.

I have no sympathy for those who believe the constitution of our country is a yoke to be borne because of necessity—and I cannot appreciate how anyone can hesitate to recognize the constitution as the supreme law of the land.

I have no sympathy with those who rend the air with loud applause over the names of Lee and Jefferson Davis and sit mute when the name of the martyred Lincoln is mentioned.

I have no sympathy with the condition of mind that rends the rafters from their moorings at the strains of "Dixie's Land" and hangs the head in silence under the strains of the "Star Spangled Banner" and the music of the union.

But standing here today with my feet on either side of the Mason and Dixon's line, I unite with these departed heroes in spirit, and with the living heroes in fact in extending the hand of fellowship and brotherly love to the heroes of the "Lost Cause" and to their children—and welcome them to stand with us under the constitution and the flag—that guarantees to them and to us protection everywhere—and let us ask them with us to bow the head in humble reverence to the sweet strains of the music of the union.

I know not how others may feel, but I believe that this is the only way to have a happy, contented and prosperous country.

The war of the rebellion developed many strong characters and furnished illustrious names to the pages of history—but I have always thought that on occasions of this kind, in paying homage to the illustrious commanders, we do not properly recognize the private soldier; who stood in the forefront of battle; who marched with gun and pack, foot sore, hungry and weary; who dug in the trenches at night, and fought by day;

who left their wives and little ones at home, many times to be cared for by the neighbors; who braved the storms of snow and sleet and rain; who kept their eyes on the flag and followed it where destruction reigned, and death stood with outstretched hands to welcome them to unmarked graves.

What would have become of the Grants, the Shermans, or the Sheridans without this great patriotic force behind them.

Let us place the flowers with a little more tenderness on the grave of the private soldier, and let us hope and pray that the great God who sees into and reads the hearts of all men, will ordain that nature shall cause to grow on every unmarked grave of the private soldier this day, a modest flower to unite its perfume with the spirit of patriotism that raises there, and joins the sweet refrain of the music of the union.

I came here today at the invitation of Rosecrans Post No. 78 of the Grand Army of the Republic—it is fitting and proper that these services should be held under its guidance and direction, because the time is coming soon when this grand organization will be no more. When its ranks will be united on the golden shore with comrades who died in battle and who have gone before.

As I understand, it is an organization of the soldiers of the war of the rebellion.

In 1878 it had a membership of only 31,016. In 1890 it had reached a membership of 409,489, since which time its membership has been steadily decreasing, until in 1905, the last statistics available, its membership had decreased to 232,-455. A decrease from the year 1904 of nearly fifteen thousand, so that we are confronted with the fact that we are nearing the time when these living heroes will be called to join their comrades.

For the benefit of the public, I would like to give the purposes of this organization—I feel that it is not improper to do so and I take the liberty of quoting from the reports and speeches of officers of this great organization as to its purposes and objects.

In his report of 1883 the Adjutant General said:

"It is now well understood that the Grand Army of the Republic is *not* a huge political machine, that it favors no political party, and indorses no man for office. As an organization it inculcates a spirit of patriotism in the rising generation. As an organization the members do not forget "that fraternity of feeling which binds them together as *comrades,* that charity which prompts them to the noblest sacrifices for the needy and destitute wards of the Grand Army, and that *Loyalty* which binds them together as citizens, and to an undying vigilance which is the price of liberty."

In an address to the Encampment in 1874, Commander Devins said:

"The objects of our Association are such as should commend themselves not only to those who have fought under the flag of the Union, but to all good citizens also. Against our organization it has been especially charged that it was secret in its character, and that all secret societies were dangerous in a republican government. Plausible as this remark sounds, it is obvious that it can have no proper application to those societies whose purposes are well known, and whose secrecy is limited entirely to the Ritual by which their proceedings are conducted, and to their modes of recognizing their fellow members. *The Grand Army has no purpose that it is unwilling to reveal to the world;* it has no obligation that any citizen soldier, who is the same man today in thought and feeling that he was in the hour of trial, cannot take without hesitation or reservation; it has no political bearing or significance; any effort to turn it to any such object is to be resisted with our utmost resolution. As the old army was always broad enough to include all (no matter what might be their differences of opinion as to men or measures) of loyal and true devotion, so this Association is broad enough to welcome to its ranks every veteran whose heart still beats responsively to the music of the Union. In this connection I deem it proper to say that sometimes *attempts* have been made to secure the influence of our organization in matters merely political, such as aiding in

elections of, or securing appointments for, particular individuals. Such attempts have *never* received, and *will not at any time* receive, any encouragement at the National Headquarters. They are not only in violation of the whole *spirit* of our order but of its *letter,* as expressed by its Rules and Regulations. Let it be understood that our organization has no system of politics except that great and grand system in which all true men are agreed, whether citizens or soldiers—those principles of devotion to the death, if need be, for Liberty and the Laws, for the Constitution and the Union, which we once preached with our rifles in our hands and our country's flag above our heads, amidst the smoke and fire of an hundred battlefields. Let it be known that by these principles alone we are united, that this society does not exist for any personal ends or selfish purposes, and that it is not to be used by any man, or any set of men. If those who have enjoyed life together as schoolmates or classmates, delight to renew the scenes of their former life, and to live over again in each other's company the days that are passed, surely the tie of affection which binds together men who have not only enjoyed much but suffered together, must be one of no ordinary character.

"Unless hearts were flint, no man could be insensible or cold to him by whose side he had stood shoulder to shoulder in the ranks of war, upon whose fidelity and courage he had known that his own life depended, and felt reassured as he looked upon his resolute brow and kindling eye, and to whom he had been all that is expressed by the simple but dear word —*comrade.*

" 'Agreeable and delightful as are the social characteristics of our association, it has higher aims than these, to guard and cherish the memory of those of our comrades who have passed away; to teach the inestimable value of the services of those who—unused to the trade of arms—did not hesitate, when the hour of trial came, to leave the plow in the furrow and the hammer on the anvil, and commit themselves to the shock of battle, appealing to the God of battles for the justice of their cause, is with us a most sacred duty. And this not

alone that the *dead* may be *honored,* but that the *living* may be *encouraged* to imitate their example, and that the strong spirit of nationality and loyalty to the Government which bore us up so bravely through four years of unexampled trial may be fostered and strengthened, and that we ourselves may be consecrated anew to the cause for which so many have suffered. But, although it is our object to do justice to the memory of our dead, it is our aim to do justice to the living also; to secure a fair and just recognition of their claims, and to protect their rights by all suitable means within our control. Above all, as true homage must consist not in words but in deeds, we have always held that no higher honor could be paid to the just fame of the brave men who have defended the Republic than to assist by kind words and material aid all good and true soldiers who by wounds, disease, old age or misfortune, have become dependent, and tenderly to care for the widows and orphans of the fallen. The motto which our order bears—'Fraternity, Charity and Loyalty,'—is the brief summary of its principles.' "

In an address to a national encampment, Chaplain-in-Chief Lovering said:

"So far as the faith and morals of the G. A. R. are concerned, I have this to say: Its faith has its religion, and its religion has the devout obedience of every worthy member of our order. I do not refer to *any* religion, sectarian or universal, liberal or conservative, Christian or Pagan, as such. Whatever disputes there may be outside of our organization concerning them, do not affect us. Religion means *bond.* The highest religion casts out all spirit of fear and makes its 'bond' that of love. Our religion, within the terms of our organization, claims that highest bond. It is permeated, it is saturated with the spirit of that love. That love is *love of country.* That religion is the religion of patriotism.

" 'Its altars are the graves of the unforgotten and heroic. Its symbol is the flag of our Union. Its priests are all those, within its organization, who confess this soldierly creed: I

believe in a fraternity which joins in indissoluble union, justice and right.

" 'I believe in a charity that, while merciful to a conquered foe, does not stultify itself by surrendering the fruits of victory; that never forgets the brightness of that cause which has been made illustrious by the heroic sacrifices of those whose graves should be the shrines of the Nation's reverence.

" 'I believe in loyalty that acknowledges *"one country and one flag;"* That makes American citizenship honorable everywhere; that calls rebellion a crime, and the penalty of treason—*death.*

" 'I believe that, in fraternity and charity, we should stand shoulder to shoulder, willing at all hazard of favor or fame to defend the G. A. R. as the standard bearer of the nation's loyalty.

" 'There is one word I wish to emphasize. It is the rallying word of our whole body. It gives the pulse beat to every heart in every "Post." It is written upon every altar of patriotism we call a soldier's grave. It speaks to us in the honorable scars which wounds or disease, or the wasting hand of time has made on those who in the fullness of manhood stood forth to battle for the Union and the right. It is woven into every thread, red, white, or blue, of our glorious banner. It shines in every ray of light that gleams from the stars we have plucked with full hands from the skies to brighten and glorify our flag. It is the *one* word that is above the taint of political partisanship, and which seals our allegiance to one country and one flag. Cicero, the Roman orator, when he denounced the traitor and conspirator, Cataline, said, "Let it be written upon the forehead of every citizen what are his views concerning the republic." *Our* views have been written upon the pages of our Nation's history in ineffaceable characters. The ink was *blood;* the pens were *bayonets* and *sabers.* One word focalizes these views. It is written upon the forehead of every soldier. The spirit of it beats in the heart of every soldier. The temper of it toughens every muscle and thrills along every nerve of every soldier. That word is *"Loyalty."* '

These sentiments as expressed by these patriots is the voice of the good citizen. An inspiration to those of us coming after them and to generations yet unborn.

Who can speak with greater authority or greater right than those whose deeds add emphasis to the sentiments expressed and testify to the eternal truth that this country is and shall ever remain the land of the free and the home of the brave—under the constitution and the flag.

Let us sit at the feet of these heroes today, and drink from their lips the lessons of Patriotism—Loyalty—Love of home and Country,—that will insure the perpetuity of the Union, and commend ourselves with those who have gone before to the care and keeping of Him who holds in the hollow of His hand the destinies of all nations, and confide to His protecting care the constitution and the flag.

LECTURE No. 4.

EXTRACTS FROM A SERIES OF LECTURES DELIVERED ON EXTRAORDINARY JUDICIAL REMEDIES.

RIGHT OF AN OFFICER TO ARREST WITHOUT A WARRANT.

DELIVERED BY HON. JOHN F. GEETING, OF CHICAGO, BEFORE THE STUDENTS OF THE ILLINOIS COLLEGE OF LAW.

"Restraint of personal liberty at the arbitrary will of a police officer is repugnant to the principles of free government, and should only be countenanced when public safety requires it. By the English common law, an officer obtaining reliable information as to the commission of a felony, or dangerous wounding likely to result in a felony, had authority to arrest any person whom he had reasonable grounds to believe guilty; officers also were authorized to arrest persons committing breaches of the peace in their presence. This doctrine was re-announced by our Supreme Court in Shanley vs. Wells, 71 Ill., 78, and declared to be the limit of authority for arrests without warrant; but notwithstanding that decision, the doctrine should be received with qualification. The common law doctrine regarding the arrest of felons was adapted to conditions then existing; and to a limited schedule of crimes. The term 'felony', at common law, meant a crime which caused the forfeiture of lands and goods, and was frequently punishable by death. The class of persons termed 'felons,' at and before the date from which we take our common law, was such as required immediate action. The felon at common law, was generally one who committed murder, robbery, burglary, larceny, or other infamous crimes; and, being bent on committing crime, was equally alert to evade justice. To require a warrant for the arrest of a felon of that period, would have acknowledged the impotency of the law's machinery; and would have been a disregard of public safety. At present, but few felonies are punishable by death; while the list of crimes known as

statutory felonies have increased with marked rapidity. In this country, as a general rule, any crime punishable by imprisonment in the penitentiary is a felony. Many of these felonies arise out of official and commercial matters, in which the alleged offenders have no desire to escape; but quietly await arrest or voluntarily appear in court and offer bail. As the common law was the result of conditions then existing, it should rather be relaxed or expanded to suit the change of conditions. It would be unreasonable, to permit an officer, in every instance of a statutory felony to make an arrest without a warrant. For such offenses as murder, burglary, arson, or other like felonies, the right of an officer to arrest without a warrant is undoubted; but as to some of those other felonies, created by statute, the doctrine of common sense should apply and govern according to the exigencies of the case.

"The right of an officer to arrest for a breach of the peace committed in his presence has in some jurisdictions been very properly confined to those cases where the circumstances require immediate action. If within the sight of an officer, a well-known citizen, in the immediate vicinity of his home, commits a simple assault, but desists before the officer attempts an arrest, none should be made; for there being no danger of escape, or the continuation of the assault, there is no necessity for immediate action. In such a case, prosecution by complaint and warrant is adequate. This qualification is made in Sarah Ways case, 41 Mich., 299, and Tillman V. Baird, 121 Mich., 425; but is left an open question in North vs. People, 139 Ill., 81."

In speaking of the treatment of prisoners after arrest, Mr. Geeting said:

"When the person is arrested, either with or without a warrant, it is the imperative duty of the officer to take the prisoner before a magistrate with the least practical delay. This doctrine was not only announced by Sir Matthew Hale in his 'Pleas of the Crown' (2 Hale's Pleas of the Crown, 119), but is re-announced by our statutes (Criminal Code, Div. VI., Sec. 7), the practice of placing prisoners in cells, and 'booking' them before they are taken into court is contrary to the law. If the hour is seasonable, the prisoner in fit condition, the court in session, and no danger of immediate rescue, the prisoner must first be taken to the magistrate who may then hear the case immediately, admit to bail, or commit him. The unnecessary imprisonment of a prisoner simply for the purpose of 'booking' him is a good ground for a

suit in trespass, if not a criminal warrant against each officer concerned."

THERE CANNOT BE AN UNCONSTITUTIONAL LAW.

In Tillman vs. Beard, 121 Mich., 475, it was held that, a prosecution by complaint and warrant based upon a void city ordinance, if made in good faith, does not render the complainant or the magistrate liable for damages. This case appears as a leading case in the Thirteenth American Criminal Reports, but following it, Mr. John F. Geeting makes an editorial criticism, as follows:

Arrests made upon void ordinances: The doctrine announced in the above case, that an officer or complainant is not liable for damages for proceeding under a void act of the legislature or void city ordinance, is at least subject to criticism and great doubt.

The court seems to base its decision upon "good faith" on the part of the complainant or officer, and on an erroneous conception of the term "law." The court say: "A party in good faith making a complaint for the violation of any law or ordinance is not required to take the risk of being mulcted in damages if courts afterward hold it unconstitutional."

It is difficult to understand how any law can be unconstitutional; or, how that which is unconstitutional, can be in any sense termed a law.

A law is an authoritative rule governing, controlling or limiting the actions of mankind. That which is not authoritative and operative, is not law. The Constitution is the supreme law of the land, and is the charter by which the Legislature exists and operates. An act of the Legislature in violation of the constitution is void because it is in violation of law, and is not authorized by the charter through which the Legislature acts. Such an act had in its inception no vitality; and, by being judicially declared unconstitutional, loses none. The judicial branch of the Government must respect all the existing laws of the land. It has no repealing powers. When it declares an act of the Legislature unconstitutional, it simply ignores the act as being void; as not being a law, and leaves it with no less vitality; for that which was never infused with life has none to lose. Cer-

tainly the Court would not hold that a complainant or officer could plead such void act or ordinance in justification for an arrest or prosecution made or instituted after the act or ordinance was judicially declared unconstitutional; yet if the judicial branch of the Government has no repealing power, and the act or ordinance loses nothing by the decision, why should such plea then be rejected? It may be said that after the Court ignores the act, good faith is no excuse, but every one is presumed to know the law, and "ignorance of the law is no excuse."

Good faith and ignorance of the law is not a defense to a prosecution for a violation of a valid penal statute; yet the Court in Tillman vs. Baird holds, that trespassers are not liable for making unlawful arrests or instituting unlawful prosecutions, under void acts of the legislature, or void city ordinances, until the judiciary has proclaimed, that which all are presumed to know.

This question came before the Supreme Court of Minnesota in 1871, in the case of Judson vs. Riordon, 16 Minn., 431. The plaintiff in the Court below obtained a judgment for $800, in an action for false imprisonment for a period of two and one-half hours. The defendant attempted to justify under a section of the ordinances of the City of St. Paul, which section was as follows:

"All persons, who at a fire shall refuse to obey any order or direction given by any person duly authorized to order or direct, or who shall resist or impede any officer or other person in the discharge of his duties, shall in the absence of sufficient excuse, be punished by a fine not exceeding $50. Any member of the common council, or any fire warden, may arrest and detain such person in his custody until such fire is extinguished."

The Court held the last clause of the section void, and said:

"We have seen that the ordinance was void; therefore, the arrest was none the less illegal, therefore, none the less malicious, because the defendant intended to act, or did act under it."

Later in the opinion, the Court said:

"If the defendant acted without authority of law in arresting and detaining plaintiff, the implication of malice is not rebutted by proof that he supposed himself to be proceeding legally.

"It is no defense to the action, though it may be evidence in mitigation of damages." Sedg. on Damages, 528.

In the case of Darst et al. vs. People, 51 Ill., 286, the plaintiff in error sought to reverse a conviction for riot. It appeared

from the evidence in the Court below, that the plaintiffs in error, two of whom were policemen, and the others trustees of the town of Eureka, Woodford County, Illinois, had broken into the grocery of one Moustier, and taken therefrom several kegs of whiskey and beer and conveyed them beyond the limits of the town, leaving them there on the ground. They justified under an ordinance which declared that all intoxicating liquors kept within the limits of the town for the purpose of being sold or given away as a beverage, to be drank within the town were nuisances. The ordinance directed that the police should abate such nuisances and remove the liquor beyond the limits of the town. The Supreme Court held that the ordinance was void, and that the conviction should be affirmed.

In State vs. Hunter, 106 N. C., 796, 11 S. E. Rep., 366, a conviction for false imprisonment against a police officer of the City of Asheville was affirmed. The Court held that the ordinance under which the officers, attempted to justify was unconstitutional, and in the course of the opinion said:

"In the exercise of the extraordinary power given him by the charter, it was the duty of the defendant, before he touched the person of the prosecutor and demanded a surrender of his liberty, to know that the misdemeanor had been committed either from seeing or from such information as made him willing to incur the risk of indictment, or of being mulcted in damages if no ordinance had been violated. The question of good faith on the part of the policeman comes to his aid when he is resisted in making an arrest that he has an undoubted right to make, if there be resistance, and the question arises whether excessive force was used to overcome it; but policemen of Asheville must determine, at their peril, preliminary to proceeding without warrant, whether a valid ordinance has been violated within or out of their view."

In Burke vs. Bell, 36 Me., 317, a provision of a town by-law directing officers to arrest brawlers and intoxicated persons and commit them for "a space not exceeding forty-eight hours" was held void; and no defense to a suit for false imprisonment by one who was arrested and held for the space of two days without a trial.

TRIAL BY JURY MUST BE PRESERVED.

The trial by jury comes to us from remote antiquity. It has withstood the reign of tyrants, survived the overthrow of dynasties, refuted the criticisms of its enemies, and remains as one of the best expressions of free government by the people in their original and sovereign capacity.

Executive, judicial, and ministerial officers and members of legislative assemblies generally are to some degree influenced by party prejudices, ties of friendship, public sentiment, or ambition; but jurors, not self-nominated, assume a humbler but more independent function. Jurors are summoned from the community at large; come together as strangers to each other, and to the parties litigant; have no rivals seeking to unseat them; have neither desire nor opportunity to extend their term of public service; their duties are those of the ordinary citizen, often performed at a sacrifice; their remuneration is meager; they are actuated alone by a desire to accomplish justice; they assemble today; perform their public service; disperse tomorrow and disappear from the public gaze.

The trial by jury also is termed "trial by the country;" for, in contemplation of law, the jury represents the country. In civil cases, the parties having certain fixed rights under the law, the jury only passes upon the evidence, and must take the law as the judge states it in his instructions; but, in criminal cases, the prosecution being one for an alleged offense against the country, the jury, as the country itself, may construe the law and acquit the accused contrary to the instruction of the judge. Many are the cases when it becomes the duty of the jury to do so. Judges are not infallible in their constructions of the law; breaches of the law often are technical or trifling and not deserving of punishment; misfortune is frequently regarded as crime; and were it not for this humane and wise doctrine of the law the law itself would assume the character of a fierce monster, ready to do the bidding of a malicious prosecutor or an arrogant judge.

The efficacy of the jury system in limiting the arbitrary exercise of power so often attempted by judges is evidenced by many instances in both England and America, of which space will permit reference to but two.

In 1670, William Penn, subsequently the founder of the commonwealth of Pennsylvania, was tried upon the charge of unlawfully preaching, and, with others, forming an unlawful

assembly in the streets of London. He was a Quaker and as such was obnoxious to the Church of England. The presiding judge, instilled with religious prejudice and inflated with vain presumptions as to judicial infallibility, viewed the Quaker preacher as a selfconfessed lawbreaker, treated him with contempt, and to silence his protests ordered him to the rear of the court-room. Contrary to the instructions of the court the jury returned a verdict that Penn was guilty of preaching, but repeatedly and positively refused to find him guilty of unlawfully preaching. Finally a verdict of not guilty was returned and accepted, but in arrogant rage the court fined each of the jurors, one of whom, Edward Bushnell, true to his sense of manhood, ignored the fine and was committed to prison. He was released from imprisonment by Chief Justice Vaughn upon a writ of habeas corpus. Since then the independence of jurors is a recognized and fixed principle.

On July 29, 1735, John Peter Zenger, editor of the New York Weekly Journal, was placed on trial charged with libeling that notorious despot and colonial governor of New York, William Crosby. At a preliminary hearing of the case the presiding judge disbarred Zenger's attorney because he called in question the judge's commission. On the trial he refused to admit testimony to prove the truth of the alleged libel and instructed the jury to return a verdict of guilty. The jury, exercising its right to pass upon the law as well as upon the evidence, returned a verdict of not guilty, which not only was hailed with enthusiasm in New York but electrified the people of the other colonies; and, as has been well claimed, was one of the initial and effective blows in favor of American independence.

In order "that the great and essential principles of liberty and free government may be recognized and unalterably established" the first constitution of Illinois provided: "That the trial by jury shall remain inviolate;" and: "That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." Consistent with these declarations in our organic law the general assembly, at an early date, enacted the following: "Jurors in all criminal cases shall be judges of the law and the fact."

Positive as these declarations are, and sacred as are the human rights guarded by them, public prosecutors have treated them as formal and trifling technicalities, while many of the judges have endeavored to nullify them. Frequently jurors have

been instructed by presiding judges that before they attempt to exercise this right which the law has given them they must be able to say, upon their oaths, that they know the law better than the court. How unwarranted this encroachment on both the traditional and statutory right of the people, in criminal cases, to be judged by their peers! How absurd this instruction! Who is there that on his oath can say that he knows the law? Judges differ in construing the law. Supreme Courts have been instituted to correct their errors. The instruction is a self-impeachment of the judge who utters it, and should be considered so by the jurors.

The question as to whether or not this bulwark of free government by the people shall be dismantled now is a vital question before the people. Within the last few weeks the state's attorneys of Illinois, in convention, have demanded its repeal and a bill to that effect is now before the legislature. What pure motive inspires these men, who are generally selected because of their skill in political tactics rather than for their knowledge of law or love of the public weal, to demand the repeal of this heritage, coming from our free-born, liberty-loving ancestors, seasoned by the experience of centuries, adorned with the triumphs of justice, and forming one of the foundation stones of our commonwealth?